

## Office Action Summary

Application No.

10/702,193

Applicant(s)

KELLEY, RUSSELL I.

Examiner

Susan T. Tran

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Double Patenting*

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-52 of U.S. Patent No. 6,737,078 ('078).

Although the conflicting claims are not identical, they are not patentably distinct from each other because the '078 patent claims a process for enhancing reproductive performance in a companion animal consisting essentially of feeding the animal a diet including omega-6 and omega-3 fatty acids. The ratio of said omega-6 fatty acids to said omega-3 fatty acids is from about 3.5:1 to about 12.5:1. The amounts of the acids are found in claims 5-15. Animal includes dog or cat is found in claims 22 and 25.

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Process for maintaining litter size or process for increasing live births is found in claims 2-4. Accordingly, the present claims anticipate the claims of the '078 patent.

***Claim Rejections - 35 USC § 103***

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart EP 0 678 247 A1, in view of Avav et al. WO 99/66877 and, Nawar US 6,641,847 or DE 4042354 (DE '354).

Reinhart teaches a pet food product comprising fatty acid, e.g., omega-6 and omega-3 in the ratios of from 3:1 to 10:1 (see abstract, and page 2, lines 1-30). The product further comprises fiber, minerals, carbohydrates, 30-34% protein, and 20-23% fat (page 3, lines 13-54). The product can be used to treat and maintain companion animals, such as dogs or cats (page 3, lines 25-31).

Reinhart is silent as to the use of the product for enhancing or promoting reproductive performance.

Stitt teaches an animal feed blend comprising fatty acid to increase live births and improve the fertility of animals (see abstract, and columns 3-4). Stitt teaches the use of flaxseed in the feed (ID). Stitt does not explicitly teach the present of omega-6. However, it is known in pharmaceutical art that flaxseed contains both omega-3 and omega-6 fatty acid. However, to be more specific, Nawar teaches foodstuff comprising omega-6 (linoleic acid), which promotes reproduction, overall growth, healthy skin, and cardiovascular health (column 7, lines 50 through column 8, lines 1-40).

DE '354 teaches animal feed comprising linoleic acid (omega-6), wherein the feed promotes fertility, improves performance, and glossy coat (abstract). Thus, it would have been obvious to one of ordinary skill in the art to use the food product rich in fatty acid taught by Reinhart to promote fertility/performance/reproduction in view of the teachings of Stitt and Nawar or DE '354 to obtain the claimed invention. This is because Stitt teaches an animal feed rich in fatty acid such as omega-3 fatty acid to promote fertility, because Nawar and DE recognize fatty acid such as omega-6 fatty can also be use to promote fertility, and because Reinhart teaches an animal feed rich in fatty acid to promote an overall health. One of ordinary skill in the art would have been motivated to combine omega-3 and omega-6 to improve fertility/performance/reproduction since the prior arts teach using fatty acids including omega-3 and omega-6 to promote fertility in animal is well known in the art.

### ***Response to Arguments***

Applicant's arguments filed 02/14/07 have been fully considered but they are not persuasive.

Applicant argues that Reinhart does not teach or suggest use fatty acids for anything with respect to reproduction. Reinhart only teaches using fatty acids in reducing allergic and inflammatory response in order to improve skin appearance. Thus, there can be no expectation of success for using fatty acids to enhance reproductive performance found in Reinhart. Because Reinhart does not disclose methods of enhancing reproductive performance, Reinhart does not teach or suggest all

of the claimed limitations. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Reinhart is cited in view of Stitt, DE '354 and Nawar for the teachings of the claimed invention. The secondary references recognize the use of fatty acid, specifically omega-3 and omega-6 separately, to promote fertility. Thus, the skilled artisan would have been motivated to combine omega-3 and omega-6 to promote fertility since the prior arts teach the same functions for both, omega-3 and omega-6. The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Accordingly, the 103(a) rejection is maintained.

The obviousness double patenting rejection is maintained because applicant has not filed a terminal disclaimer to overcome the rejection.

#### ***Pertinent Arts***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Watson is cited as of interest for the teachings of flaxseed that contains both, omega-3 and omega-6 fatty acids.

***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan T. Tran whose telephone number is (571) 272-0606. The examiner can normally be reached on M-R 6:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
SUSAN TRAN  
PRIMARY EXAMINER

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A41615